No. 87-1400

Supreme Court, U.S.
FILED
MAR 23 1988
JOSEPH F. SPANIOL, JR.
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In The

# Supreme Court of the United States

October Term, 1987

ALBERTO CLAUSELL and PATRICIA CLAUSELL,

*Appellants,*

vs.

HOBART CORPORATION,

*Appellee.*

**ON APPEAL FROM THE SUPREME COURT OF FLORIDA**

## MOTION TO DISMISS APPEAL

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## LIST OF PARTIES

Pursuant to Rule 28.1, Supreme Court Rules, Appellee Hobart Corporation, provides the following listing of all of its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Parent–Company—

Premark International, Inc.

Subsidiaries and Affiliates—

DKI Commercial Equipment Holdings, Inc.
Cook Insurance Co. Limited
Hobart International Holdings, Inc.
Hobart International Inc.
The Stero Company
SC Bourgeois
Hobart Sales & Service
Hobart Europe S.A.
Tasselli
Compagnie Hobart, S.A.
Hobart A.G.
Vulcan-Hart Corp.
Hobart Maschinen B.M.B.H.
Hobart (Swiss) A.G.
Vulcan-Hart Canada, Inc.
Foster Refrigerator (U.K.) Limited
Hobart Manufacturing Company, LTD.
Hobart B.V.
Compagnie Hobart, S.A. Belge
Foster Subsidiaries
Hobart Equipment Leasing Limited
Premark Canada, Inc.

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Appellee Hobart Corporation, pursuant to Supreme Court Rule 16, files this motion to dismiss appeal on the grounds (1) that the Florida Supreme Court did not render a decision ruling on the validity of a statute so as to vest this Court with jurisdiction to entertain the appeal under 28 USC § 1257(2), and (2) that the appeal does not present a substantial federal question.

## I. STATEMENT OF THE FACTS

This is a product liability action in which the plaintiffs, the Clausells, sued the defendant Hobart Corporation for damages arising from injuries sustained by Alberto Clausell while using a meat chopping machine manufactured and sold by Hobart some fourteen years before the accident. The trial court granted Hobart's motion for summary judgment on the ground that the action was barred by the Florida statute of repose, section 95.031(2) Florida Statutes (1985), which provided in pertinent part:

> (2) Actions for products liability under s. 95.11 (3) must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event within 12 years after the date of delivery of the completed product to its original purchaser . . . regardless of the date the defect in the product . . . was or should have been discovered.

The factual chronology on which Appellants base their constitutional argument can be summarized as follows:

— May, 1969: The meat chopper in question was manufactured and sold by Appellee Hobart.

— 1975: Florida's statute of repose, section 95.031 (2), Florida Statutes, became law.

— December 11, 1980: The Supreme Court of Florida decided *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980) (per curiam) holding that, as applied to a product-liability action, the statute of repose was unconstitutional because it "denies access to courts under Article I, Section 21, Florida Constitution."

— September 1, 1983: Appellant Alberto Clausell was injured while using Hobart's machine.

— June 7, 1985: The Clausells filed their lawsuit against Hobart.

— August 29, 1985: The Supreme Court of Florida decided *Pullum v. Cincinnati, Inc.*, 476 So.2d 657, 659 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986), which receded from *Battilla* and held that section 95.031(2) is not unconstitutional.

— March 19, 1986: Trial court entered final summary judgment for Hobart on the basis of the statute of repose.

The Florida intermediate appellate court affirmed the summary judgment based on Florida's statute of repose and certified to the Florida Supreme Court three questions of great public importance:

I. WHETHER THE LEGISLATIVE AMENDMENT OF SECTION 95.031(2), FLORIDA STATUTES (1983), ABOLISHING THE STATUTE OF REPOSE IN PRODUCT LIABILITY ACTIONS, SHOULD BE CONSTRUED TO OPERATE RETROSPECTIVELY AS TO A CAUSE OF ACTION WHICH ACCRUED BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

II. IF NOT, WHETHER THE DECISION OF *PULLUM V. CINCINNATI, INC.*, 476 SO.2D 657 (FLA. 1985), *APPEAL DISMISSED*, — U.S. —, 106 S.CT. 1626, 90 L.ED.2D 174 (1986), WHICH OVERRULED *BATTILLA V. ALLIS CHALMERS MFG. CO.*, 392 SO.2D 874 (FLA. 1980), APPLIES SO AS TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION.

III. WOULD THE APPLICATION OF *PULLUM*, TO BAR A CAUSE OF ACTION THAT ACCRUED AFTER THE *BATTILLA* DECISION BUT BEFORE THE *PULLUM* DECISION, DEPRIVE THE PLAINTIFF OF A RIGHT OF DUE PROCESS GUARANTEED BY THE UNITED STATES CONSTITUTION?

*Clausell v. Hobart Corp.*, 506 So.2d 1160 (Fla. 3d DCA 1987). The Florida Supreme Court answered the first and third questions in the negative, and the second question in the affirmative, thereby approving the decision of the intermediate appellate court. *Clausell v. Hobart Corp.*, 515 So.2d 1275 (Fla. 1987).

This appeal followed.

## LEGAL ARGUMENT

Appellants seek review in this Court, pursuant to 28 USC § 1257(2),[1] of a decision of the Florida Supreme Court affirming a summary judgment in favor of the Appellee on their personal injury claim on the ground that it was barred by Florida's statute of repose, section 95.031(2), Florida Statutes (1985). Appellants assert that a significant federal question is presented by this case—specifically, whether the application of the statute of repose to their claim deprived them of a federal property right in violation of the due process clause of the United States Constitution.

The Court should note at the outset that though Appellants purport to direct their constitutional attack against the statute as applied to them, that is not the real basis for their argument. They make no constitutional assault on the statute itself,[2] nor do they contend that there is any constitutional impediment to the application of the literal terms of the statute to them. The real target of their due process argument is Florida's decisional law,

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[1] It is Appellee's position that this Court does not have jurisdiction under 28 U.S.C. 1257(2) because there was no ruling by the Florida Supreme Court on the validity of the statute itself. We note, however, that the Appellants have requested that, in the alternative, this Court treat their Jurisdictional Statement as a petition for writ of certorari. *See* Jursdictional Statement at 19, n.11. If this Court decides to treat Appellant's Jurisdictional Statement as a petition for writ of certiorari, Appellee requests that this Court treat its Motion to Dismss as its brief in opposition to certiorari.

[2] The obvious reason for the absence of such an attack is that it would be futile in light of the authorities hereinafter discussed.

under which any statute previously declared unconstitutional is deemed valid *ab initio* if the case which declared the statute invalid is later overruled. *Clausell v. Hobart,* 515 So.2d at 1276. *See also Christopher v. Mungen,* 61 Fla. 513, 55 So. 273, 280 (1911). It is to this common law rule, not the statute of repose itself, that this Court should direct its attention in determining whether it has jurisdiction of this appeal and whether a substantial federal question exists in this case.

The third certified question did not raise the issue of the constitutional validity of the statute of repose, and the opinion of the Florida Supreme Court did not pass on any such issue. The Florida Supreme Court merely rejected Appellants' assertion of a federal property right and held that the *Pullum* decision had rendered the statute valid *ab initio* notwithstanding *Battilla.* Since there was no ruling in favor of the validity of the statute itself in the face of an attack on constitutional grounds, there is no jurisdiction under 28 USC § 1257(2). *See Rohr Aircraft Corp. v. County of San Diego,* 362 U.S. 628, 629 (1960); *Charleston Federal Savings & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-187 (1945); *Wilson v. Cook,* 327 U.S. 474, 482 (1946); *Jett Bros. Distilling Co. v. Carrollton,* 252 U.S. 1, 5 (1920).

The cases cited in the Jurisdictional Statement at note 3 do not support Appellants' contention that this Court has jurisdiction under 28 USC § 1257(2). Each of the cited cases involves a typical challenge to a state statute, *as applied,* on the grounds of repugnancy to the federal constitution. Those authorities are inapposite here, where the Florida Supreme Court merely rejected Appellant's

claim of a constitutionally protected vested right, without ruling on the constitutionality of the statute itself.

In support of their contention that this case involves a substantial federal question, Appellants raise three points:

> (1) Their cause of action was perfectly viable at the time of injury and at the time their suit was filed (Jurisdictional Statement, p. 19);
>
> (2) Their cause of action is a federal property right of constitutional dimension (Jurisdictional Statement, p. 20); and
>
> (3) No state interest is sufficiently compelling to override Appellants' pre-existing constitutional rights. (Jurisdictional Statement, p. 23).

Appellee's response is that (1) Appellants had no viable cause of action in tort under state law, and (2) they therefore were not deprived of any right protected under the due process clause of the fourteenth amendment to the United States Constitution.

There is no substantial federal question in this case because the determination of the retroactive application of state-court judicial decisions is for the court rendering the decision; federal constitutional law has no say in the retroactivity of such decisions. *See Wainright v. Stone,* 414 U.S. 21 (1973); *Linkletter v. Walker,* 381 U.S. 618 (1965); *United States v. Johnson,* 457 U.S. 537 (1982). Under Florida law a decision of a court of last resort which overrules a former decision or establishes previously unrecognized claims for relief is retrospective as well as prospective in its operation unless specifically declared by the decision to have only a prospective effect.

*Florida Forest & Park Service v. Strickland,* 154 Fla. 472, 18 So.2d 251 (1944). *Florida East Coast Railroad v. Rouse,* 144 So.2d 260 (Fla. 1967).

The collective import of the foregoing authorities is clear. After the Florida Supreme Court's decision in *Battilla,* which declared Florida's statute of repose unconstitutional, the statute was dormant, but not dead. The statute of repose existed within the statutes, and there was always the potential for the statute to be reactivated. *See State v. Lee,* 156 Fla. 291, 22 So.2d 804 (1945); *Lamb v. Volkswagenwerk Aktiengessellschaft,* 631 F.Supp. 1144 (S.D. Fla. 1986), *aff'd,* 835 F.2d 1369 (11th Cir. 1988). Thus, when the Florida Supreme Court receded from *Battilla* in *Pullum* and held that the statute of repose was not unconstitutional, (without specifically limiting the effect of *Pullum* to prospective application) the statute was thereby rendered valid from its inception. *Clausell v. Hobart Corp.,* 515 So.2d at 1276.

According to Florida law, the statute of repose is deemed valid on September 1, 1983, the day Appellant Alberto Clausell was injured and on June 7, 1985, the day Appellants filed their suit against Appellee, notwithstanding the temporary dormancy of the statute during the *Battilla* interlude. Because the injury occurred and the suit was filed more than twelve years after the machine in question was delivered to its original purchaser, the statute of repose prevented what might otherwise have been a cause of action for Appellants from ever arising.

Their cause of action never came into existence, because it had already been extinguished by the twelve-year statute before the injury occurred. The alleged harm was

*damnum absque injuria,* a wrong for which the law affords no redress. *See Hartford Fire Ins. Co. v. Laurence, Dykes, Goodenburger,* 740 F.2d 1362, 1367 (6th Cir. 1984); *Lamb,* 631 F.Supp. at 1147; *Dague v. Piper Aircraft Corp.,* 513 F.Supp. 19, 26 (N.D. Ind. 1980). Appellants clearly could have no federally protected property right in a claim which was non-existent under state law.

Appellants assert that the statute of repose was a nullity at the time their cause of action arose and at the time their complaint was filed because an unconstitutional statute "confers no rights; it imposes no duty; it affords no protection; it creates no office, it is, in legal contemplation, as inoperative as though it had never been passed." *See* Jurisdictional Statement at 20, *citing Norton v. Shelby County,* 118 U.S. 425, 442 (1886). That argument totally misapprehends the effect given by the Florida Supreme Court to a decision overruling a prior decision holding a statute unconstitutional. As shown above, the unconstitutional statute is treated as if it were valid from its adoption, as if it had never been ruled unconstitutional. This rule is exclusively a matter of state concern and does not give rise to any federal questions. The federal rule set forth in *Norton* does not hold otherwise.

The attempt by Appellants to create a question of constitutional significance is a futile effort based on faulty logic. Two factors combined to produce the ruling below: (1) The statute of repose itself, and (2) Florida's case law that a decision overruling a prior decision which declared a statute unconstitutional relates back to render the statute valid *ab initio.* These two factors, considered either separately or in tandem, do not give rise to any substantial federal question in this case.

There is obviously no constitutional infirmity in the statute of repose itself. Appellants seem to concede that by stating, at page 21 of their Jurisdictional Statement, that the state was "free to amend or even abolish" their cause of action. In any event, it has long been recognized as a general rule that state statutes of limitations and of repose do not violate the due process clause of the fourteenth amendment.[3] Appellants' claim could, therefore,

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[3] *Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190 (1922) (state statute of limitation that prescribed the time for bringing suits which attack patents from the state or transfers of property by state's subdivisions held not offensive to federal due process); *Wayne v. Tennessee Valley Authority*, 730 F.2d 392 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (upholding state's ten-year statute of repose in product liability actions against attack on due process grounds); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger*, 740 F.2d 1362 (6th Cir. 1984) (upholding state statute of repose relating to designers and builders of property improvements against constitutional attack on due process grounds); *Clark v. Gulesian*, 429 F.2d 405 (1st Cir. 1970), *cert. denied*, 400 U.S. 993 (1971) (state's recognition that a defendant has an interest in repose and in the avoidance of stale claims does not deprive the plaintiff of any constitutional right to fair or equal treatment); *Hargraves v. Brackett Stripping Mach. Co.*, 317 F.Supp. 676 (E.D. Tenn. 1970) (statutes of limitation are within the sovereign power of each state to enact and are not subject to constitutional attack for lack of due process absent a showing of arbitrariness or capriciousness).

Significantly, this Court's dismissal of *Pullum* for want of a substantial federal question indicates that this Court did not find that Florida's statute of repose violated any provision of the federal constitution. *See Pullum v. Cincinnati, Inc.*, 475 U.S. 1114 (1986); *Hicks v. Miranda*, 422 U.S. 332 (1975) (dismissal for lack of federal question may be considered a decision on the merits); *Mandel v. Bradley*, 432 U.S. 173, 180 (1977) (Brennan, J. concurring) (summary dispositions such as dismissals for lack of substantial federal question should be accorded appropriate, but not necessarily conclusive, weight).

consistent with due process, be extinguished by direct application of the statute of repose.

It logically follows that there is likewise no impairment of any due process rights when the same claim is extinguished through application of Florida's decisional law, which views the statute of repose as valid *ab initio,* despite the erroneous prior ruling in *Battilla* that it was invalid. If the Appellants had no property rights protected under the fourteenth amendment from extinguishment by the statute of repose, they likewise had no such rights which could not be terminated by operation of Florida's decisional law reinstating the statute. This is especially so since a state court's treatment of its decisions as prospective or retrospective is not a matter of federal concern under the United States Constitution.[4]

Appellants contend that their cause of action in tort was a federal property right of constitutional dimension. Further, Appellants assert:

> Although, in the abstract, the state may have had no obligation to create the cause of action in the first place, and is free to amend or even abolish the cause of action, it is not wholly free to ignore the rights or expectations which arose before its amendment or

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[4] *See Wainwright, Linkletter,* and *Johnson, supra,* cited at page 6 of this motion. *See also, Cassidy v. Firestone Tire and Rubber Co.,* 495 So.2d 801 (Fla. 1st DCA 1986), *petition for review denied,* 506 So.2d 1040 (Fla.), *cert. denied,* 56 U.S.L.W. 3240 (U.S. Oct. 5, 1987) (No. 86-2041), wherein the petitioner challenged the retroactive application of the *Pullum* decision to bar his claim. For the same reasons set forth in note 3, *supra,* this Court's summary disposition of *Cassidy* may also be viewed as a decision on the merits which establishes that no substantial federal question exists on the issues raised on this appeal.

> abolition, because they "acquired an independent existence competent to survive the destruction of the provision which gave them birth."

*See* Jurisdictional Statement at 21, *citing Coombes v. Getz,* 285 U.S. 434, 442 (1932).

This argument by Appellants does not fit this case. Although there may indeed be circumstances, as in *Coombes,* where the rights of litigants attain an "independent existence" which constitutionally precludes their impairment, no such circumstances exist here. At the time of the *Pullum* decision, Appellants had no rights comparable to the contract rights held to exist in *Coombes.* In *Coombes,* because the petitioners had vested contract rights, those rights were said to stand independent of the statute that created them; accordingly they could not be abrogated by a subsequent change in the law, without violating both the impairment of contract and due process provisions of the United States Constitution. Neither in *Coombes* nor in the cases cited therein was any tort cause of action or a right derived from tort held to be "vested." The present case involves common law tort rights that are nothing like the vested contract rights in *Coombes;* Appellants were merely pursuing a common law tort theory to recover damages.

The Florida Supreme Court correctly recognized below that a plaintiff has no vested right in any rule of common law or in any tort claim. *Clausell v. Hobart Corp.,* 515 So.2d at 1277-1278, *citing Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59 (1978) and *Ducharme v. Merrill-National Laboratories,* 574 F.2d 1307 (5th Cir.) *cert. denied* 439 U.S. 1002 (1978). *See also*

*Hammond v. United States,* 786 F.2d 8, 13 (1st Cir. 1985). The mere prospect that a plaintiff might recover damages on a tort theory is not tantamount to a vested right. *See Lamb v. Volkswagenwerk Aktiengessellschaft,* 631 F.Supp. 1144 (S.D. Fla. 1986), *aff'd,* 835 F.2d 1369 (11th Cir. 1988). Appellants did not receive, by virtue of *Battilla,* an absolute assurance that the statute of repose would remain forever abrogated. *See Lamb* at 1150. To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand. *Lamb,* 631 F.Supp. at 1149, *citing Division of Workers' Compensation v. Brevda,* 420 So.2d 887 (Fla. 1st DCA 1982).

The cases cited by Appellants to support their contention that their tort claim was a constitutionally protected property right are inapposite. Appellants argue based on *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) and *Boddie v. Connecticut,* 401 U.S. 371 (1971), that their cause of action was a species of property protected by the fourteenth amendment. *Logan* involved a suit by a discharged employee under a state's fair unemployment practices act for discriminatory employment practices. The complainant's cause of action was terminated because a state officer, for reasons beyond the complainant's control, failed to comply with a statutorily mandated hearing procedure. On appeal, the complainant challenged the termination of his cause of action as a violation of due process. This Court agreed. In reversing the Illinois Supreme Court's affirmance of the dismissal of the employee's claim, this Court held that a plaintiff cannot be deprived of a statutorily created cause of action

by the wholly arbitrary and irrational acts of state officials. *Logan,* 455 U.S. at 431-32.

As the Florida Supreme Court opinion below noted, however, this Court in *Logan* specifically recognized that the state remains free to create substantive defenses or to eliminate its statutorily created causes of action altogether. *Clausell v. Hobart Corp.,* 515 So.2d at 1276, citing *Logan,* 455 U.S. at 432. In fact, *Logan* acknowledged that the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest in protecting individual citizens from state action that is wholly arbitrary or irrational. *Id., citing Martinez v. California,* 444 U.S. 277 (1980).

In *Boddie,* indigent parties seeking access to state courts to obtain divorces challenged on due process grounds a state's requirement that all parties filing actions pay court fees and service of process fees. This Court held in *Boddie* that the fee requirement was a violation of the indigent parties' due process rights because the state monopolized the means for legally dissolving the marriage relationship and resort to the judicial process was not voluntary. This Court specifically restricted its holding in *Boddie* by stating, "[w]e do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the due process clause of the fourteenth amendment so that its exercise may not be placed beyond the reach of any individual." *Boddie,* 401 U.S. at 382-83.

Taken together, the import of *Logan* and *Boddie* is that where a state recognizes a statutorily created cause of action or specifically requires its citizens to submit to

judicial process, it can deny its citizens neither their recognized cause of action nor the required access to its courts without due process of law.

Unlike *Logan* and *Boddie,* this case does not involve arbitrary and irrational actions by state officials in denying an individual litigant a recognized cause of action or access to the courts where the state has determined that resort to judicial process is mandatory. To the contrary, it involves a determination of the law with respect to all litigants by the state's highest court. As *Logan* clearly establishes, the state was free to eliminate a cause of action altogether, and the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational. *Logan,* 455 U.S. at 432-33.

Finally, Appellants' third point is that "no state interest is sufficiently compelling to override the Clausells' pre-existing constitutional rights." The point is ill-founded because the "compelling state interest" standard urged by Appellants is not the correct standard by which state action is to be measured in this case.[5] In order to satisfy the due process requirements there must be a rational relationship between the state's purposes and the application of the statute. *Martinez v. California,* 444 U.S. 277 (1980). The rational relationship between the state's purpose in enacting the statute of repose and the application

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[5] In their Jurisdictional Statement, Appellants assert that this issue has not previously been addressed by Appellee Hobart and that Hobart has, therefore, conceded this point. As pointed out above, it is Appellee's position, as consistently maintained throughout these proceedings, that a different standard altogether applies.

of *Pullum* which reinstated that statute *ab initio* can best be discerned from the purpose of the statute of repose itself. The Florida statute of repose was intended to curtail the perpetual liability of manufacturers, because such liability places an undue burden on maufacturers. *See Pullum,* 476 So.2d at 659. The entire purpose in cutting off the right of action after a specified time would be totally undermined by creating exceptions based upon the date of filing a lawsuit, rather than measuring the period of limitations from the date of delivery of the product. *See Lamb v. Volkswagenwerk Aktiengessellschaft,* 631 F.Supp. 1144, 1151 (S.D. Fla. 1986), *aff'd* 835 F.2d 1369 (11th Cir. 1988). Thus, there is a rational relationship between the state's purpose in enacting the statute and the retroactive application of *Pullum.*

In summary, no substantial federal question is presented by this case and the appeal should be dismissed. *Pullum,* overruling *Battilla,* validated the statute of repose from its effective date. Thus, notwithstanding the intermediate *Battilla* decision, Florida's twelve-year statute of repose was valid on September 1, 1983, the day Appellant Alberto Clausell was injured, and on June 7, 1985, the day Appellants filed suit against Appellee. Because the injury occurred and the suit was filed after the twelve-year statute had run, no cause of action in favor of Appellants arose. Appellants obviously could have no federally protected property right in a non-existent cause of action. Even if Appellants had a cause of action in tort against Appellees, such a cause of action does not rise to the level of a property right protected by the United States Constitution.

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## CONCLUSION

Based upon the foregoing reasons and authorities, this appeal should be dismissed. If the Court should elect to treat the appeal as a petition for certiorari, the petition should be denied on the grounds that it presents no substantial federal question.

Respectfully submitted,

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